91-103

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF INDIANA, *Petitioner*,

v.

DEAN SHANE DOWELL, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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QUESTION PRESENTED

Whether *Faretta v. California*, 422 U.S. 806 (1975), requires a court to conduct a special inquiry or colloquy to determine whether a criminal defendant is making a knowing and intelligent waiver of counsel in favor of self-representation, and if such an inquiry or colloquy is required, what advisements are necessary to convey sufficiently the "dangers and disadvantages" of self-representation, to which questions the states and federal circuits have given conflicting answers.

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OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported at 557 N.E.2d 1063, and is reprinted in the appendix hereto on p. A-1, *infra*.

JURISDICTION

The judgment of the Court of Appeals of Indiana, First District, was filed on August 6, 1990, reversing Respondent's conviction for which he was sentenced on November 20, 1989. Subsequently on April 12, 1991, the Supreme Court of Indiana denied, without opinion, the State of Indiana's petition to transfer the cause from the Court of Appeals (*see* appendix hereto at p. A-12). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 in that Respondent claims a right under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 6

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Dowell was charged and convicted of forgery (Ind. Code 35-43-5-2) and theft (Ind. Code 35-43-4-2(a)) for stealing and forging blank company checks from his former employer. Dowell was sentenced to five (5) years and two (2) years, respectively, to be served concurrently.

At Dowell's initial hearing on June 19, 1989, the presiding Magistrate advised him of his Constitutional rights, including his right to counsel. Dowell advised the court that he had a particular private attorney in mind for his

representation. The court informed Dowell about various deadlines approaching and that he should therefore retain an attorney within twenty days. The court also admonished Dowell that he should contact the court if he experienced difficulty retaining counsel. At the end of the initial hearing, the court set June 26, 1989, as a date for a hearing on Dowell's representation status, which hearing Dowell was ordered to attend unless an attorney entered an appearance on his behalf (R.197-208).

On July 6, 1989, the court held a hearing on the status of Dowell's representation. Dowell appeared without an attorney and stated that he did not want pauper counsel and that he and his people were still attempting to secure the services of the particular attorney he had mentioned at his initial hearing. When the Court suggested appointment of counsel until Dowell retained other counsel, Dowell replied: "No. I don't want no pauper counsel out of Morgan County." The court reminded Dowell that a pretrial conference was scheduled for August 7, 1989, and Dowell assured the court that he would have representation by then. When the court reiterated that Dowell had the option of appointed counsel, Dowell asked: "I can talk for myself if

I don't though [retain counsel], can't I[?]" The court replied:

> You do have that right. That is true. You have a right to proceed without an attorney if you want to do that, but I just want to make sure you understand that you can get appointed counsel if you request it.

(R.211-216). Eleven days after this hearing, on July 17, 1989, the court issued an order appointing counsel for Dowell with the provision that counsel would assume a stand-by role should Dowell refuse his services (R.16, 20). On October 13, 1989, appointed counsel informed the court that his services had been refused and that he was continuing in an advisory role until further instructed (R.32-33).

On the day of trial, before voir dire began, the court noted that Dowell appeared without counsel, and heard from Dowell that it his determination to represent himself. The court then explained to Dowell that stand-by counsel would be available to him for questions and assistance, that he would be bound by the same standards as an attorney both as to law and procedure, and that the court would be unable to answer his questions during the trial. In addition, the court explained in detail the order of the trial and his

responsibilities during same (R.221 *et seq.*). Dowell then represented himself during *voir dire* and throughout the trial.

After the State had delivered its final argument to the jury, Dowell asked the court to permit his stand-by counsel to give his final summation. The court denied the request and Dowell gave his own final argument (R.501-2).

How the Federal Question was Presented

The federal question under *Faretta* first appeared at the July 6, 1989, hearing on the appointment of counsel when Dowell inquired of the court whether he could represent himself if he was unsuccessful in retaining private counsel, to which the court replied in agreement that Dowell did possess such a right (R.216). The *Faretta* issue was expanded before *voir dire* when the court advised Dowell of the consequences of his decision to represent himself (R.220-229, 237-238). The issue was first articulated as a federal question implicating *Faretta* on the appeal to the Court of Appeals of Indiana.

On appeal to the Court of Appeals the parties argued the issues of Dowell's assertion of his *Faretta* right, his competence to do so, the sufficiency of the advisemen

concerning the consequences of doing so, and the propriety of the court's denial of Dowell's request that stand-by counsel deliver his final argument. The unanimous First District of the Court of Appeals held that Dowell was competent to waive his right to counsel and proceed *pro se*, that the advisement concerning consequences was deficient, and that the court had abused its discretion in denying the request for stand-by counsel to give the final defense summation. The Court reversed the conviction and remanded the case for retrial. However, the Court of Appeals specifically and pointedly noted that their statement regarding stand-by counsel was not necessary to their decision and that they were reversing the judgment solely on the basis of the insufficient advisement. The Supreme Court of Indiana subsequently denied, without opinion, the State's petition for transfer to review the case.

REASONS FOR GRANTING THE WRIT

A writ of certiorari to the Court of Appeals of Indiana is requested by the State of Indiana in order to resolve the conflict among the states and federal circuits concerning the proper interpretation and application of *Faretta v. California* with respect to the requirement that a

criminal defendant be aware of the "dangers and disadvantages" of self-representation before adopting such a course: whether a special inquiry or colloquy must be conducted, and what should be the nature and extent of such inquiry or colloquy. This question was most recently raised and denied certiorari in *McDowell v. United States*, 484 U.S. 980, 108 S.Ct. 478, 98 L.Ed.2d 492 (1987) (case below, 814 F.2d 245), over the dissenting opinion of Justice White (joined by Brennan, J.).

In *Faretta*, this Court held that a criminal defendant contemplating self-representation "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" 422 U.S. at 835, 95 S.Ct. at 2541. Since this rule was announced, the circuits and states have wrestled with the question of how a court should determine whether a defendant is waiving counsel knowingly and intelligently, in particular how to gauge whether a defendant appreciates the "dangers and disadvantages." Some circuits and states have held that no special inquiry or colloquy need be made, and that the accused's waiver can be assessed from the totality of the facts and

circumstances. Others have held that, although an on-record inquiry or colloquy is advisable (and some have instituted such a practice in their supervisory capacity), if one is absent then the total record will provide a recourse. The jurisdictions on the opposite pole have held that a special and searching inquiry must be made to determine the sufficiency of the accused's waiver, and some of these jurisdictions additionally require that a detailed advisement of specific dangers and disadvantages be recited to the defendant. A convenient compilation and examination of the various decisions across the country is given in 98 A.L.R.3d 13, "Accused's Right to Represent Himself."

Those jurisdictions holding no deliberate and searching inquiry or colloquy necessary are, in part: *United States v. Bailey*, 675 F.2d 1292 (D.C. Cir), *cert. denied* 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982); *United States v. Hafen*, 726 F.2d 21 (1st Cir.), *cert. denied* 466 U.S. 962, 104 S.Ct. 2179, 80 L.Ed.2d 561 (1984); *United States v. Thompkins*, 623 F.2d 824 (2d Cir.1980); *United States v. McDowell*, 814 F.2d 245 (6th Cir.), cert. denied 484 U.S. 980, 108 S.Ct. 478, 98 L.Ed.2d 492 (White, J., dissenting) (1987);

United States v. Trapnell, 638 F.2d 1016 (7th Cir.1980); *United States v. Kimmel*, 672 F.2d 720 (9th Cir.1982) (limited later by *United States v. Balough*, 820 F.2d 1485 (9th Cir. 1987). Some of these cases have held, however, that an inquiry would be helpful or the better practice, but is not required; a few others have instituted an inquiry or advisement procedure only in their supervisory capacity.

Some of the cases holding that a searching inquiry is necessary, with a detailed advisement of consequences included, are in part: *United States v. Welty*, 674 F.2d 185 (3d Cir.1982); *United States v. Chaney*, 662 F.2d 1148 (5th Cir.1982); *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir.1986); *Strozier v. Newsome*,871 F.2d 995 (11th Cir.1989); *People v. Lopez*, 71 Cal.App. 568, 138 Cal.Rptr. 36 (1977); *State v. Quinn*, 565 S.W.2d 665 (Mo.App.1978); *State v. Christensen*, 40 Wash.App. 290, 698 P.2d 1069 (1985).

The circuits and states cannot agree on the correct interpretation and implementation of the Court's *Faretta* decision, and similarly situated defendants are receiving substantially disparate treatment due to the absence of uniformity of practice. Indiana is now the latest in the line of jurisdictions who have interpreted *Faretta* to require a

searching inquiry and extensive advisement as a prerequisite to enjoyment of the right to represent oneself. The trial court in this case fully advised Dowell that counsel was available, that if he represented himself he would be bound as any attorney to the rules of law and procedure, that the court would not offer him the special dispensation of answering his questions during trial, and that stand-by counsel would be available. Finally, the court explained the order of trial and Dowell's responsibilities during same (R.221 et seq.). The totality of the facts and circumstances from the whole record show a defendant who was sufficiently advised of the consequences of his decision to proceed with self-representation.

It is Indiana's submission that the searching inquiry and extensive advisements required by the Court of Appeals of Indiana are not a proper interpretation and application of this Court's *Faretta* decision, which decision mandates no more than an examination of the entire record to assess the accused's knowledge of the consequences of self-representation. Further Indiana submits that, if a colloquy specific to consequences is required, *Faretta* does not constitutionally require the extensiveness imposed by the Court of

Appeals and those jurisdictions cited above. The Court of Appeals of Indiana erred in its interpretation of *Faretta*; the better reasoned interpretation would have affirmed the inquiry and colloquy Dowell received from the trial court. A resolution of the conflict among the circuits and states will bring much-needed uniformity to an area of criminal law already suffering from tensions caused by competing constitutional rights.

CONCLUSION

This petition for a writ of certiorari should be granted to resolve the conflict among the circuits and states, a conflict that results in continued disparate treatment of similarly situated defendants.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals of Indiana A-1

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IN THE

COURT OF APPEALS OF INDIANA

No. 55A01-9003-CR-125

Dean Shane DOWELL, v. STATE of Indiana,
Defendant-Appellant, Plaintiff-Appellee.

August 6, 1990

BAKER, Judge.

STATEMENT OF THE CASE

Defendant-appellant Dean Shane Dowell (Dowell) appeals his convictions for forgery[1] and theft[2].

We reverse and remand for a new trial.

STATEMENT OF THE FACTS

On July 19, 1989, Dowell appeared before the Magistrate in Morgan County for an initial hearing. The Magistrate advised Dowell of his constitutional rights and

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1 IND. CODE 35-43-5-2.

2 IND. CODE 35-43-4-1(a).

of the charges against him. Dowell stated at that time that he would be employing counsel. When Dowell failed to obtain counsel, the Magistrate held a hearing on the issue of appointment of pauper counsel. At this hearing, Dowell stated he was attempting to contact a particular attorney and that he did not need pauper counsel. Dowell asked if he could speak for himself in the event that he was unable to employ counsel, and the Magistrate informed him that he had that right.

The trial court then issued an order appointing counsel for Dowell. Dowell refused the appointed counsel's services, and upon the court's order counsel continued to serve in an advisory capacity only.

Prior to voir dire, the court asked Dowell on two occasions if he wanted to represent himself, and Dowell responded affirmatively. The court informed Dowell he would be held to the same standards as an attorney. Dowell represented himself at voir dire and at the trial. Prior to his closing argument, Dowell requested that his advisory counsel be permitted to conduct the final summation. The court denied this request, and Dowell conducted his own closing argument. He was convicted of theft and forgery and was sentenced to concurrent terms of five and two years.

ISSUES

Dowell presents three issues for our review:

I. Whether he made a clear and unequivocal assertion of his right to self-representation.

II. Whether he knowingly, voluntarily, and intelligently waived his right to counsel.

III. Whether the trial court abused its discretion when it denied Dowell's request for stand-by counsel to deliver the final argument of the defense.

DISCUSSION AND DECISION

I.

Dowell first argues he did not clearly and unequivocally assert his right to represent himself, and the court thus erred by allowing him to do so. The Sixth Amendment to the United States Constitution guarantees to a criminal defendant the right to represent himself if he so chooses. *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562; *Anderson v. State* (1977), 267 Ind. 289, 370 N.E.2d 318, *cert. denied*, 434 U.S. 1079, 98 S.Ct. 1273, 55 L.Ed.2d 786. As a prerequisite to the assertion of the right of self-representation, there must be a clear and unequivocal request to proceed pro se. *Anderson, supra*. "It must be, 'sufficiently clear that if it is granted the defendant should not be able to turn about and urge that he was improperly denied counsel.'" *Id.* 370 N.E.2d at 320 (quoting *Meeks v. Craven* (9th Cir.1973) 482 F.2d 465).

Dowell relies on *Anderson, supra* for the proposition that he did not clearly and unequivocally assert his right to self-representation. In *Anderson*, the defendant told the court he would rather represent himself if he could not obtain his own attorney. The court subsequently appointed public defenders to represent the defendant, and the defendant accepted these attorneys. *Id.* at 320. The defendant in *Anderson* did not mention self-representation again. The court held there was not a clear and unequivocal assertion of the right to proceed pro se. *Id.*

The present case is factually distinguishable from *Anderson, supra*. In this case, Dowell inquired of the Magistrate whether he could "talk for [himself]" if he was unsuccessful in hiring his own attorney. *Record* at 216. The trial court subsequently appointed counsel for Dowell, and Dowell indicated he did not want the services of this appointed attorney. Prior to the trial, Dowell was asked twice if he wanted to represent himself and each time he responded affirmatively. We conclude Dowell made a clear and unequivocal request to proceed pro se.

II.

Dowell next argues that he did not knowingly, voluntarily and intelligently waive his right to counsel because the court did not fully explain to him the consequences of self-representation. The right to counsel can only be relinquished by a knowing, voluntary, and intelligent waiver of the right. *Russell v. State* (1978), 270 Ind. 55, 383 N.E.2d 309; *McKeown v. State* (1990), Ind.App., 556 N.E.2d 3. When the right of self-representation is properly asserted by a clear and unequivocal request within a reasonable time prior to the trial, the court needs to hold a hearing to determine the defendant's competency to represent himself and to establish a record of his waiver of his right to counsel. *Russell, supra*, 383 N.E.2d at 315; *McKeown, supra* 556 N.E.2d at 6. "*Faretta* itself mandates that such a record of waiver be established, and also advised that the pro se defendant should be advised of the dangers and disadvantages of self representation." *Id.* 383 N.E.2d at 314. Waiver of the assistance of counsel may not be inferred from a silent record. *Jackson v. State* (1982), Ind.App., 441 N.E.2d 29.

In this case, Dowell was not advised of the dangers and disadvantages of self-representation. At Dowell's initial hearing, the Magistrate informed Dowell of his constitutional

rights and of the charges against him. He asked Dowell if he read and understood the English language and if he was currently under the influence of drugs or alcohol. The Magistrate said nothing about the dangers and disadvantages of self-representation. Prior to trial, the trial court told Dowell he would be held to the same standards as an attorney regarding the law and procedure. The court then informed Dowell of the general pattern of the trial. The court did not advise Dowell of the dangers and disadvantages he would risk by representing himself.[3]

Waiver of assistance of counsel may be established based upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Id.* There was no showing here, circumstantial or otherwise, that Dowell was aware of the benefits legal counsel could provide and the importance of those benefits at trial. Dowell's conduct actually militates against the conclusion that he knowingly and intelligently waived the right to counsel. A Motion in Limine filed by the State requested the court to order Dowell to refrain from approaching witnesses on the witness stand because "[t]he defendant has a history of unstable and dangerous acts." *Record* at 40. In addition, during pre-trial discussion of this motion the State alleged that Dowell had previously exhibited dangerous tendencies and "actually exhibited unstable behavior." *Record* at 236.[4] These allegations placed some

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3 We note the court's appointment of stand-by counsel was an appropriate prophylactic device, *Jackson, supra*, but we do not believe this appointment obviates the need for an advisement of the dangers and disadvantages for self-representation.

4 The court took this motion under advisement, and stated it would rule on the motion if Dowell's actions became a problem. The court did not rule on the motion.

duty on the court to ascertain the competency of the defendant to make a knowing and intelligent waiver of his right to counsel. No such record of waiver was established. Dowell's waiver of the right to counsel was not knowing, intelligent, and voluntary.

We recognize the tension between the right to counsel and the right of self-representation, and the difficult position in which this places the trial court. Because these rights are reciprocal, to assert one necessitates a waiver of the other. If the trial court allows the defendant to proceed pro se, it may have denied the defendant the right to counsel, and if the trial court appoints counsel, it may have violated the defendant's right to proceed pro se. *Strozier v. Newsome*, 871 F.2d 995 (11th Cir. 1989). Therefore, to establish a knowing, intelligent, and voluntary waiver of a defendant's right to counsel, trial courts should use the following guidelines which are based on the everyday realities of criminal trials.

The defendant should know of the nature of the charges against him, the possibility that there may be lesser included offenses within these charges, and the possibility of defenses and mitigating circumstances surrounding the charges, and the possibility of defenses and mitigating circumstances surrounding the charges. The defendant should be aware that self-representation is almost always unwise, that the defendant may conduct a defense which to his own detriment, that the defendant will receive no special indulgence from the court and will have to abide by the same standards as an attorney as to the law and procedure, and that the State will be represented by experienced professional legal counsel.

Specifically, the defendant should be instructed that an attorney has skills and expertise in preparing for and

presenting a proper defense not possessed by the defendant. These include, among other things: (1) investigating and interrogating witnesses; (2) gathering appropriate documentary evidence; (3) obtaining favorable defense witnesses; (4) preparing and filing pre-trial motions; (5) preparing appropriate written instructions for the jury; (6) presenting favorable opening and closing statements; (7) examining and cross-examining witnesses at trial; and (8) recognizing objectionable, prejudicial evidence and testimony and making proper objections thereto.

Finally, the trial court should inquire into the educational background of the defendant, the defendant's familiarity with legal procedures and rules of evidence, and additionally, into the defendant's mental capacity if there is any question as to the defendant's mental state. If the defendant chooses to proceed *pro se*, he should realize he cannot later claim inadequate representation. *See U.S. v. Allen*, 895 F.2d 1577 (105t Cir.1990); *Strozier, supra; Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir.1986); *Jackson, supra; State v. Quinn*, 565 S.W.2d 665 (Missouri, 1978); *People v. Lopez*, 71 Cal.App.3d 568, 138 Cal.Rptr. 36 (1977); *People v. Burnett*, 188 Cal.App.3d 1314, 234 Cal. Rptr. 67 (1987).

As we have already stated above waiver of the right to counsel may be established by the particular facts and circumstances surrounding the case. *Jackson, supra*. If the background, experience, and conduct of the defendant do not clearly indicate waiver, the trial court, with reference to the above guidelines, must make an inquiry sufficient to establish a knowing, voluntary, and intelligent waiver of the right to counsel.

III.

Although not necessary to our decision, we address Dowell's final argument that the court erred when it refused to allow his stand-by counsel to conduct the closing argument. We agree with Dowell. A trial court's ruling on midtrial requests for a change in representation will be reversed only upon a showing of an abuse of discretion. *Koehler v. State* (1986), Ind., 499 N.E.2d 196. The supreme court, in *Koehler, supra*, adopted factors to be considered by a trial court in order for the court to exercise meaningful discretion in ruling on a defendant's request to change from self-representation to counsel-representation. These factors include the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, the reasons set forth for the request, the length and stage of the trial proceedings, disruption or delay which reasonably might be expected to ensue if the motion is granted, and the likelihood of the defendant's effectiveness in defending against the charges if the motion is denied. *Id.* at 199.[5]

Dowell made his request prior to his closing argument. This was the first time he had indicated that he wanted to change from self-representation to counsel-representation and Dowell had not previously made requests for substitution of counsel. Dowell's performance prior to this stage of the trial had been less than effective; the record shows his questions to witnesses were often ambiguous, irrelevant, and repetitive. Dowell had stand-by counsel who was present throughout the trial and who may have been prepared to assume representation. We do not say that

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5 We reiterate that a waiver of the right to counsel must be explicit. *See Kimbering v. State* (1990), 556 N.E.2d 1331.

the court necessarily should have granted the request; however the trial court should have considered the above factors.

In response to Dowell's request for stand-by counsel to conduct the closing argument, the trial court simply stated "for reasons that I am not at liberty to go into that would be inappropriate at this point." *Record* at 502. It does not appear from the record that the trial court considered the above factors or even asked Dowell what his reasons were for the request. As the supreme court stated in *Koehler*, "[i]t would be illogical to bar all opportunities for reasserting one's right to counsel once a defendant realizes his mistake in proceeding pro se." *Id.* at 199. Dowell realized his error, and was entitled to a consideration of the factors cited *Koehler, supra*, upon a ruling on his request. The trial court abused its discretion in summarily denying Dowell's request for stand-by counsel to conduct the closing argument.

We base our decision on the second issue addressed in this opinion. Because Dowell did not knowingly, intelligently and voluntarily waive his right to counsel, the convictions are reversed and this cause is remanded for a new trial.

MILLER, P.J., and ROBERTSON, J., concur.

ORDER DENYING TRANSFER

STATE OF INDIANA INDIANAPOLIS, 46204
Clerk of the Supreme Court,
Court of Appeals and Tax Court

DWAYNE M. BROWN, CLERK TELEPHONE
317-232-1930

GARY DAMON SECREST Cause Number
219 STATE HOUSE 55A01-9003-CR-00125
Indianapolis, IN 46204-0000 LOWER CAUSE
55C018905CR70

DOWELL, DEAN SHANE -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 4/12/91 APPELLEE'S PETITION TO TRANSFER IS DENIED WITHOUT OPINION. ROGER O DEBRULER, ACTING CHIEF JUSTICE DEBRULER, GIVAN, DICKSON, AND KRAHULIK, JJ., CONCUR. SHEPARD, C.J., WOULD GRANT TRANSFER.

WITNESS my name and the seal of said Court,
this 12TH day of APRIL, 1991

S/ Dwayne Brown
Clerk Supreme Court, Court of Appeals and Tax Court